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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-489

DEPARTMENT OF THE AIR FORCE, *et al.*,

Petitioners,

—v.—

MICHAEL T. ROSE, *et al.*

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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Preliminary Statement

This brief is submitted in opposition to a petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit seeking review of a judgment of that Court which reversed an order of the United States District Court for the Southern District of New York and remanded this case for an *in camera* inspection by the District Court of certain documents sought by respondents pursuant to the Freedom of Information Act, 5 U.S.C. §552.

Questions Presented

1. When a claim is made that the disclosure of documents sought pursuant to the Freedom of Information Act (the "FOIA") would cause a clearly unwarranted invasion of personal privacy within the meaning of exemption 6 of the FOIA, may an agency be required (i) to submit the documents to the District Court for *in camera* inspection and a determination as to whether personal identifying references can be deleted, and (ii) to produce such documents to respondents if the District Court determines that such deletions can successfully be made?

2. When a substantial public interest exists in documents sought pursuant to the FOIA, is exemption 2, pertaining to matters related solely to internal agency personnel rules and practices, inapplicable to such documents?

Statement of the Case

In a proceeding brought pursuant to the FOIA, respondents, who are members or former members of the New York University Law Review, have sought access to documents collected and maintained by the United States Air Force Academy relating to the operation of its disciplinary systems for use in connection with a study of disciplinary practices and procedures at the five service academies.

The documents sought are summaries of Honor Code adjudications assembled and maintained in the Academy's Honor Code reading files, with personal references or other identifying information deleted, and case summaries of Ethics Code adjudications located in the Academy's Ethics

Code reading files, also with personal references or other identifying information deleted.

Disclosure was initially refused by the Department of the Air Force on the sole ground that the case summaries were "personnel and medical files" exempt from disclosure under exemption 6 of the FOIA, 5 U.S.C. §552(b)(6), on the theory that their disclosure would constitute a "clearly unwarranted invasion" of the personal privacy of certain cadets whose identities might not be preservable through editing the summaries.

The District Court rejected this basis for non-disclosure, holding that ". . . disclosure of the summaries without names or other identifying information is not an invasion of personal privacy as proscribed by the sixth exemption" and noting that "revelation of a set of facts absent some type of association with a person's name seems . . . incapable of invading anyone's personal privacy" (App. C, pp. 32A, 30A).

Notwithstanding the fact that the District Court found that exemption 6, the only ground relied upon by respondents, would not be applicable if appropriate deletions were made, the Court nevertheless refused to order disclosure on the supposition that the documents sought "related solely to the internal personnel rules and practices of an agency" and were therefore exempt under 5 U.S.C. §552(b)(2) (App. C, pp. 33A-35A).

The Court of Appeals reversed that determination. The Court held that petitioners' withholding of the case summaries, if edited to preserve anonymity, could not be based on exemption 2 (App. A, p. 8A). The Court pointed out that the case summaries do not relate solely to internal per-

sonnel rules and practices because they "have a substantial potential for public interest outside the government", and " . . . all sectors of our society . . . have a stake in the fairness of any system that leads, in many instances, to the forced resignation of some cadets" (App. A, p. 8A).

With respect to exemption 6, the court below, on the basis of the record before it, declined to determine whether the disclosure of the redacted case summaries would entail a clearly unwarranted invasion of personal privacy (App. A, p. 13A). Instead, the Court of Appeals, relying on this Court's decision in *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 93 (1973), held that petitioners had not carried their burden of proving that the summaries were exempt and remanded the case with instructions that the District Court conduct an *in camera* inspection of the summaries to determine whether personal, identifying references could be successfully deleted. If such deletions could be successfully accomplished, the summaries would be disclosed. If, on the other hand, identifying personal references could not be deleted, then disclosure would not be required (App. A, pp. 14A-15A).

The *in camera* inspection ordered by the Court of Appeals has not occurred, since the petition for a writ of certiorari has stayed the mandate of that court.

Reasons for Denying the Writ

1. The Court of Appeals did not require disclosure of the case summaries sought by respondents but merely directed that the summaries be produced to the District Court so that, in an *in camera* inspection, it could determine whether or not identifying personal references could be successfully deleted. This instruction by the Court of Appeals is fully consistent with the procedures authorized by this Court in *Environmental Protection Agency* v. *Mink*, *supra*, by the FOIA itself (5 U.S.C. §552(a)(2)),* and by numerous other appellate court decisions. See, e.g., *Bristol-Myers Co.* v. *FTC*, 424 F.2d 935 (D.C. Cir. 1970); *Soucie* v. *David*, 448 F.2d 1067 (D.C. Cir. 1971); *Sterling Drug Inc.* v. *FTC*, 450 F.2d 698 (D.C. Cir. 1971).

Disclosure is to be required only if, and to the extent that, personal identifying references can be deleted. If such deletions can be made, as is highly likely (*see* App. A, p. 14A), petitioners would have no grounds for objection to the disclosure of sanitized case files.

In any event, this case presents no novel or significant question of statutory interpretation or judicial procedure under the FOIA and certainly presents no issues which can or should be decided prior to the *in camera* inspection required by the Court of Appeals.

2. Petitioners ignore the implications of the Court of Appeals' decision which requires, after an *in camera* inspection, only the disclosure of carefully edited case sum-

* Moreover, a recent amendment to the FOIA now expressly authorizes *in camera* inspections to determine whether all or parts of any documents sought pursuant to the Act may be exempt (5 U.S.C. §552(a)(4)(B), P.L. 93-1380).

maries, and argue that exemption 6 precludes the disclosure of *all* personnel files regardless of whether a clearly unwarranted invasion of personal privacy is likely. This construction of exemption 6 is illogical and totally at variance with settled and obvious principles of statutory construction. *Cf. Banks* v. *Chicago Grain Trimmers Ass'n,* 390 U.S. 459 (1968); *Flora* v. *United States,* 362 U.S. 145 (1960); *N.L.R.B.* v. *Coca-Cola Bottling Co.,* 350 U.S. 264 (1956). As the Court of Appeals noted, not all personnel or similar files are exempt from disclosure by exemption 6, but only those whose disclosure would necessarily involve a clearly unwarranted invasion of personal privacy. The Government cites no authority whatever for its contention that the qualification, "clearly unwarranted invasion of personal privacy", does not pertain to the medical and personnel files as well as to the "similar files" referred to in exemption 6.

3. The final reason advanced in support of the application for the writ is that the Court of Appeals incorrectly determined that disclosure of the case summaries was not precluded by exemption 2, since petitioners contend that the summaries relate solely to internal personnel rules and practices.

The Court of Appeals found that the summaries constituted "quasi-legal records" of "the significant facts in each case heard by the Honor Committee and in some important cases heard by the Ethics Committee" and that the practice of circulating anonymous abstracts of cases was not uncommon or unusual (App. A, pp. 9A, 10A, 14A n.18).

Moreover, the Court noted that the case summaries do not relate solely to internal personnel rules and practices because Honor Code cases have generated a substantial public interest outside the Academy—an interest enhanced by public discussions of the Honor and Ethics case summaries by high ranking Academy officers and civilian government officials. Finally, the court noted that even in the absence of official encouragement, substantial public interest in the operation of the Codes would exist by virtue of the fact that the service academies are publicly financed and cadets form a substantial portion of the country's future military leadership (App. A, p. 8A).

In view of these factors, the court below correctly concluded that the summaries do not relate solely to internal personnel rules and practices. That conclusion is consistent with the text and legislative history of the exemption and raises no issues which would warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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